Supreme Court, U.S.
FILED
MAR 5 1998
CLERK

(2)

No. 97-1269

In The

Supreme Court of the United States

October Term, 1997

ROBERT FICALORA,

Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES CORP. & J. J. SINNOTT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

BRUCE D. CORKER*
SHANNON E. PHILLIPS
PERKINS COIE LLP
1201 Third Avenue
Seattle, WA 98101-3099
(206) 583-8888
Attorneys for Respondents

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

17 pp

QUESTION PRESENTED

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989), this Court stated that if an ERISA benefit plan "gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.' Restatement (Second) of Trusts § 187, Comment d (1959)." The question presented is:

> Whether, where an ERISA benefit plan gives the administrator discretion to determine eligibility for benefits, a court properly reviews the plan administrator's decision to deny benefits under an abuse of discretion standard, where the plan administrator produces evidence showing that a conflict of interest did not affect the decision to deny benefits.

STATEMENT PURSUANT TO RULE 29.6

The following is an affiliate or nonwholly owned subsidiary of respondent International Business Machines Corporation ("IBM"): Object Design, Inc. We have defined "affiliate" for purposes of this statement as companies in which IBM holds an interest of ten percent or greater of outstanding securities.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT PURSUANT TO RULE 29.6 ii

STATUTES INVOLVED 1

I. STATEMENT OF THE CASE 2

A. INTRODUCTION 2

B. THE MEDICAL DISABILITY INCOME PLAN 2

C. FICALORA'S APPLICATION FOR PLAN BENEFITS 3

II. REASONS FOR DENYING THE PETITION 7

A. THE DIFFERENCE IN APPROACHES USED BY FEDERAL COURTS IN WEIGHING A FIDUCIARY'S CONFLICT OF INTEREST IS NOT A MATTER OF SIGNIFICANT IMPORTANCE JUSTIFYING REVIEW 7

B. REVIEW BY THIS COURT AT THIS TIME IS PREMATURE 10

C. THIS CASE DOES NOT PRESENT CLEARLY THE ISSUE OF WHETHER A PARTICULAR APPROACH IS PREFERRED WHEN WEIGHING A CONFLICT OF INTEREST 11

III. CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Armstrong v. Aetna Life Ins. Co., 128 F.3d 1263 (8th Cir. 1997) (Beam, J., dissenting) 10

Atwood v. Newmont Gold Co., 45 F.3d 1317 (9th Cir. 1995) 10

Best v. Nissan Motor Corp., 973 F. Supp. 770 (M.D. Tenn. 1997) 10

Brown v. Blue Cross & Blue Shield of Ala., Inc., 898 F.2d 1556 (11th Cir. 1990) 7, 8, 9

Chambers v. Family Health Plan Corp., 100 F.3d 818 (10th Cir. 1996) 8

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) 7, 10

Jones v. Sonat, Inc., 997 F.2d 113 (5th Cir. 1993) 9

McCray v. New York, 461 U.S. 961 (1983) 11

Palmer v. University Medical Group, 973 F. Supp. 1179 (D. Or. 1997) 11

Taft v. Equitable Life Assurance Soc'y, 9 F.3d 1469 (9th Cir. 1993) 9

Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048 (7th Cir. 1987) 8, 9

Wildbur v. Arco Chem. Co., 974 F.2d 631 (5th Cir. 1992) 8, 9

STATUTES

29 U.S.C. § 1104(a)(1)(D) 2

Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* 1

No. 97-1269

In The

Supreme Court of the United States

October Term, 1997

ROBERT FICALORA,

Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES CORP. & J. J. SINNOTT,

Respondents.[1]

STATUTES INVOLVED

This case involves the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and, in particular, the requirement that an ERISA fiduciary

> shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –
>
> . . .

[1] Additional defendants were named in the Amended Complaint, and are included in the caption of the opinion of the Ninth Circuit. However, to the knowledge of respondents IBM and J. J. Sinnott, these additional parties never were served and never have appeared in this action.

> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA].

29 U.S.C. § 1104(a)(1)(D).

I. STATEMENT OF THE CASE

A. INTRODUCTION

Ficalora's petition reflects a selective – and often misleading – recitation of the facts. The bottom line is quite simple: Ficalora's application for benefits and appeal were denied because he failed to provide objective medical evidence demonstrating that his disability prevented him from taking any employment, having refused to cooperate with IBM's repeated requests for information to document the existence and extent of his alleged disability.

B. THE MEDICAL DISABILITY INCOME PLAN

The IBM Medical Disability Income Plan (the "Plan") provides benefits to employees who demonstrate that they are "medically disabled." CR 15; ER 107-08, 142.[2] The Plan provides that an applicant is deemed "medically disabled" when there is "satisfactory proof to IBM that a disability from any cause prevented the taking of any

[2] Citations to the factual record below are abbreviated as "CR" for Clerk's Record, "ER" for Excerpts from the Record, and "SER" for Supplemental Excerpts from the Record.

employment for pay or profit. Disability must have existed for at least nine months and be such that it presumably would continue during the employee's lifetime." *Id.* The Plan provides that the Plan Administrator has authority to determine "all matters arising in the administration, application, and interpretation of the Plan." CR 15; ER 105, 142.

C. FICALORA'S APPLICATION FOR PLAN BENEFITS

In October 1988, Ficalora experienced pain and loss of vision in his right eye. A neurological examination by Dr. Lewis Almaraz showed the possibility of multiple sclerosis ("MS"). CR 16; SER 400. Because Ficalora concluded that he had MS, he declined to follow Dr. Almaraz's recommendation that he undergo a magnetic resonance imaging ("MRI") test. CR 44, at 4. In May 1991, Ficalora stopped working at IBM and saw another neurologist, Dr. Roy Swank. CR 16; SER 400. Based on Ficalora's complaints, and without doing an MRI, Dr. Swank diagnosed Ficalora as suffering from MS. CR 16; SER 15.

In June 1991, Ficalora applied for benefits under the Plan. *Id.* Pursuant to Plan provisions, IBM requested an evaluation from Dr. Swank regarding the extent of Ficalora's disability. Dr. Swank responded by saying that Ficalora suffered from MS and corresponding fatigability, but was not so disabled that he could not return to work at IBM. CR 16; SER 42, 401.

In accordance with the Plan, IBM then sent Ficalora to two independent medical examinations in an attempt

to determine Ficalora's eligibility for benefits. CR 16; SER 401. Dr. Philip Swanson, a neurologist at the University of Washington Medical Center, found that MS was a "probable" diagnosis but that Ficalora had "no clear physical limitations." CR 16; SER 56-58, 401. Dr. Jason MacLurg, a psychiatrist, suggested that medication could ameliorate Ficalora's fatigability and recommended an MRI to confirm the MS diagnosis. CR 16; SER 26-28. Again, however, no MRI was done.

In December 1991, Dr. Swank, Ficalora's treating physician, wrote IBM that, based on symptoms Ficalora had experienced in August – almost two months before Ficalora was evaluated by Dr. Swanson – Ficalora was now unable to work at all. CR 16; SER 29, 401.

In May 1992, after unsuccessful attempts to contact Ficalora to seek further evaluation by Dr. Swanson in order to provide additional evidence, a Panel with responsibility under Plan documents for making the initial eligibility decision[3] decided to deny benefits based on its determination that, while Ficalora had provided information as to his subjective complaints,

> (1) he had not produced sufficient objective medical evidence to warrant a definitive diagnosis of MS; and

---

[3] The Plan provides that an initial determination of an individual's eligibility or ineligibility for benefits will be made by a Panel with authority delegated by the Plan Administrator. The Panel consists of the United States Medical Directors along with other individuals appointed at the discretion of the Plan Administrator (generally Benefits staff professionals or representatives from line management or Employee Relations). CR 15; ER 142.

> (2) he had not submitted proof of impairment so severe that he was unable to work.

CR 16; SER 185, 403-04. Ficalora was informed in a June 12, 1992 notice that he could seek review of the denial and that he should submit objective medical evidence with respect to these two issues. CR 16, 164-65, 405.

After receipt of the denial notice and the Plan's statement of what additional information would be needed to qualify for benefits, Ficalora did undergo an MRI, which showed that he most likely suffered from MS, and was examined by Dr. Richard Blanck, a neurologist of his choosing. Dr. Blanck diagnosed Ficalora as "probably suffer[ing] with . . . MS based on currently available data." CR 16; SER 85, 151-52, 405-06. Although Dr. Blanck's report addressed the first issue raised in the June 12, 1992 notification (diagnosis of MS), the report did not address whether Ficalora was medically incapable of "taking employment for pay or profit." CR 16; SER 151-52, 406.

With respect to the issue of whether Ficalora was incapable of working, in the period following the initial June 12, 1992 notification, Ficalora

> (1) would not allow a reexamination to determine whether he was "medically disabled" under the Plan, CR 15; ER 145; SER 239;

(2) threatened to personally sue any doctor who contradicted Dr. Swank and released him to return to work;[4] and

(3) refused to sign a release that would have enabled the Plan to contact Dr. Blanck to seek clarification and elaboration of his report, CR 15; ER 146; SER 326-28.

On December 18, 1992, the Panel reviewed and considered Ficalora's additional evidence that established plaintiff had been diagnosed with MS. CR 15; ER 148; SER 133-347. The Panel, nevertheless, recommended denial of Ficalora's appeal because Ficalora had still not produced sufficient objective medical evidence to support any conclusion that, because of his MS, he was unable to work even with appropriate restrictions, limitations and accommodations. *Id.* In fact, Ficalora produced *no new evidence*, simply arguing that because he had already been awarded social security disability benefits, he should be awarded Plan benefits. SER 145.

---

[4] In a letter to the Plan Administrator, Ficalora wrote:

> I tell you that I cannot work and that I spent years trying . . . *that Dr. Swank has declared me disabled, therefore cannot be reasonably refuted by another medical professional.* No follow-up examinations can really measure or change these facts. *I will hold personally liable for any further damage any medical professional who approves my return to the workplace* . . . . Although further medical examinations may be useful in confirming the diagnosis of the disease, *I do not recognize their ability to refute Dr. Swank's belief that I am disabled.*

CR 16; SER 180, 405 (emphasis added).

After an independent review of the Panel's recommendation and Ficalora's complete administrative record, the Plan Administrator, Michael Tarre, agreed with the Panel's recommendation and determined that Ficalora was ineligible for benefits under the Plan. CR 15; ER 148. This determination was communicated to Ficalora in a notice dated January 21, 1993. CR 15; ER 148; SER 133-34.

After the Plan Administrator's final denial of Ficalora's application, Ficalora, through his attorney, requested an additional review. SER 411-12. On August 20, 1993, IBM offered voluntarily, but conditionally, to provide additional administrative review, even though such review was neither required by ERISA nor provided for by the terms of the Plan. SER 421-22. Because of the parties' inability to agree on acceptable terms for an additional review of Ficalora's appeal, no further review was conducted after the Plan Administrator's final determination of January 21, 1993. CR 51, ¶ 6.

II. REASONS FOR DENYING THE PETITION

A. THE DIFFERENCE IN APPROACHES USED BY FEDERAL COURTS IN WEIGHING A FIDUCIARY'S CONFLICT OF INTEREST IS NOT A MATTER OF SIGNIFICANT IMPORTANCE JUSTIFYING REVIEW.

Since *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989), federal courts have set about the task of "develop[ing] a coherent method for integrating factors such as self-interest into the legal standard for reviewing benefits determinations." *Brown v. Blue Cross & Blue Shield*

of Ala., Inc., 898 F.2d 1556, 1561 (11th Cir. 1990). "[A]ll of the circuit courts agree that a conflict of interest triggers a less deferential standard of review. The courts, however, differ over how this lesser degree of deference alters their review process." *Chambers v. Family Health Plan Corp.*, 100 F.3d 818, 825 (10th Cir. 1996). There is thus no conflict among the circuit courts regarding whether a plan administrator's conflict of interest must be weighed as a factor in reviewing the administrator's decision to deny benefits.

Although the circuit courts have articulated different approaches to weighing a conflict of interest as a factor, the differences are not a matter of importance. Rather, the different approaches reflect efforts to refine consideration of possible bias. *See, e.g., Brown*, 898 F.2d at 1564 (agreed with "sliding scale" court that " 'the arbitrary and capricious standard may be a range, not a point,' " but determined that it "must fix more precisely the method for evaluating the abuse of discretion.") (quoting *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1052-53 (7th Cir. 1987)).

Although Petitioner and certain courts have described two approaches, the range of approaches is more varied. The different approaches applied by the courts often appear to overlap rather than conflict. *See Wildbur v. Arco Chem. Co.*, 974 F.2d 631, 638 (5th Cir. 1992) (noting that it had "instructed district courts to evaluate inferences of lack of good faith on a sliding scale" and that the Eleventh Circuit's presumptively void approach

is "[c]onsistent with this analysis").[5] This is because the different methods are underpinned by a common goal of modulating the degree of deference given to an administrator in light of the particular circumstances. *Compare Brown*, 898 F.2d at 1568 (a "presumptively void" court emphasizing that "a fiduciary operating under a conflict of interest may be entitled to review by the arbitrary and capricious standard . . . but the degree of deference actually exercised in application of the standard will be significantly diminished") *with Van Boxel*, 836 F.2d at 1053 (a "sliding scale" court noting that "[f]lexibly interpreted, the arbitrary and capricious standard . . . allows the reviewing court to make the necessary adjustments for possible bias in the trustees' decision").

A review of application of different approaches by federal courts gives no indication that the differences affect the results of the review. For example, as one Ninth Circuit panel remarked, "[t]he precise nature of the less deferential review in this context is not clear" but "[n]o matter what the formulation" the result would be the same in the circumstances of that case. *Taft v. Equitable Life Assurance Soc'y*, 9 F.3d 1469, 1474 (9th Cir. 1993).

---

[5] Although petitioner cites *Wildbur* as authority for the proposition that the Fifth Circuit follows a "sliding scale" approach, that court has continued to look to the Eleventh Circuit's "presumptively void" approach. For example, *Jones v. Sonat, Inc.*, 997 F.2d 113, 116 (5th Cir. 1993) ("[f]ocusing on the question of lack of good faith, we are guided by the Eleventh Circuit's holding"), suggests that the Fifth Circuit could more accurately be described as one of the circuits employing a two-step, burden-shifting approach, which it views as a refinement of the "sliding scale" approach.

There is thus no compelling reason for this Court to interfere with the weighing of conflicts of interest by federal circuit courts. All the circuits are following the guidance of this Court in *Firestone* by weighing a conflict of interest in determining whether an administrator has abused its discretion in denying benefits. The fact that courts have formulated different approaches for weighing such conflicts is not a matter of importance requiring the attention of this Court.

B. REVIEW BY THIS COURT AT THIS TIME IS PREMATURE.

Even if the issue of how conflicts of plan administrators are to be weighed were considered an important matter, review by this Court at this time would be premature. Federal courts weighing a conflict of interest have employed a variety of approaches, not just two. For example, although petitioner groups the Eighth, Ninth and Eleventh Circuits together, the approaches used by the three circuits are not identical. *See Armstrong v. Aetna Life Ins. Co.*, 128 F.3d 1263, 1267 (8th Cir. 1997) (explaining that standard applied by the majority does not follow the reasoning of the Eleventh Circuit) (Beam, J., dissenting); *Atwood v. Newmont Gold Co.*, 45 F.3d 1317, 1322 (9th Cir. 1995) (noting that it has applied an approach "similar to that of the Eleventh Circuit"); *Best v. Nissan Motor Corp.*, 973 F. Supp. 770, 776 (M.D. Tenn. 1997) ("The Ninth Circuit has employed a slightly different version of the shifting burden approach.")

Even within federal circuits, different panels of judges have employed different approaches in different

situations. *See, e.g., Palmer v. University Medical Group*, 973 F. Supp. 1179, 1190 (D. Or. 1997) (in some cases Ninth Circuit "has applied the 'sliding scale' methodology, while in other cases it has used the 'presumptively void' approach").

Continued experience with weighing of conflicts of interest in different circumstances over time may well result in the evolution of a general rule or a series of rules to be applied in different factual situations. *See id.* at 1189-90 (recommending that different methodologies be used depending on the type of ERISA decision being reviewed). Because the federal courts are still developing means of integrating a conflict into their review of administrators' decisions, this Court should defer addressing the issue at this time. *See, e.g., McCray v. New York*, 461 U.S. 961, 963 (1983) (certiorari denied where the issue requires "further study" in lower courts "before it is addressed by this Court").

C. THIS CASE DOES NOT PRESENT CLEARLY THE ISSUE OF WHETHER A PARTICULAR APPROACH IS PREFERRED WHEN WEIGHING A CONFLICT OF INTEREST.

This case involves a disability plan applicant who refused repeated requests from the plan administrators to provide medical evidence that his condition prevented him from taking employment, as required for benefit eligibility under the terms of the plan. As the district court observed, "the records are replete with plaintiff's reluctance to take medication which might relieve some

of his symptoms, and refusal to present himself for further examination." Pet'r's App. B. at 9. Given the strong evidence in the record establishing Ficalora's ongoing refusal to cooperate with IBM's requests for information about the extent of his disability, and the lack of objective medical evidence regarding whether he was capable of any employment, the denial of his benefits would have been upheld irrespective of the approach adopted. As such, this case does not clearly present the issue of whether a single, uniform approach – and which approach – should be adopted.

III. CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

PERKINS COIE LLP

BRUCE D. CORKER*
SHANNON E. PHILLIPS
Attorneys for Respondents

**Counsel of Record*